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Supreme Court of the United States

October Term, 1962.

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No. 765

M. A. HOLAHAN, TRUSTEE,
Petitioner,

versus

FORD, BACON & DAVIS, INCORPORATED,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HARRY McCALL,
and
GIBBONS BURKE,
Attorneys for Respondent,
1500 National Bank of
Commerce Bldg.,
New Orleans 12, La.

IN THE
SUPREME COURT OF THE UNITED STATES.

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

QUESTION PRESENTED.

Respondent submits that only one question is presented in this case:

Does a bankrupt's contract which involves skill on the part of, and confidence in, the bankrupt and which is incomplete at the date of the filing of a petition for involuntary bankruptcy vest in the bankrupt's trustee?

II.

REASONS FOR NOT GRANTING WRIT.

1. The Court of Appeals' Decision is Correct.

This is, of course, the most important reason for refusing the writ. The Court held that the contract between the bankrupt and the political subdivision involved skill upon the part of the bankrupt and confidence in its integrity and reputation.

> "To the extent that Gulf had a reputation for skill and integrity, that reputation would be partially based upon the past performance of its employees, so that one could rely upon Gulf's skill in *selecting* employees." (p. 31, Petition for Writ.)

Thus the contract between the bankrupt and the political subdivision was non-assignable and falls into that category of property which is excluded from the property passing to the bankrupt's trustee. For the contract is, under 11 USCA 110a(5), not a "right(s) of action, which prior to the filing of the petition he (the bankrupt) could by any means have transferred * * *".

The Trustee's attempt to maintain that the critical date for the determination of the completion *vel non* of the bankrupt's contract with the political subdivision should be the date of adjudication was succinctly answered by the Court:

> "The general proposition is that the interest of a bankrupt in a contract for personal services

which is executory on the date of bankruptcy, does not vest in the trustee. 4 Collier on Bankruptcy Sec. 70[3] (14th ed. 1962). We agree with appellant that the date of 'bankruptcy' is the date on which the petition is filed, so that the determination of what property vests in the trustee is made as of that date. The bankruptcy title provides that 'date of bankruptcy', 'time of bankruptcy', 'commencement of bankruptcy', or 'bankruptcy', with reference to time, shall mean the date when the petition was filed." (pp. 27-28 of Petition for Writ.)

2. There is No Disagreement Among the Circuits.

The Fifth Circuit has joined the First, Fourth and Sixth Circuits in holding that a non-assignable contract of the bankrupt does not vest in the trustee if that non-assignable contract was not completed at the date of the filing of the petition.

(a) In the First:

In *Villar & Co. v. Conde*, (1 Cir. 1929) 30 F. 2d. 588, the Court said:

> "It is further argued, although the point was not taken in either of the courts below or assigned here, that the defendant, Conde, could not maintain his counterclaim on the ground that the right of action vested in the trustee in bankruptcy. We do not regard ourselves called upon to consider this question, but we cannot refrain from saying that it is frivolous and without merit. The contract, for the breach of which the counterclaim was

brought, had not been broken at the time the petition in bankruptcy was filed. It was then an uncompleted and unbroken contract for personal services involving trust and confidence. Under these circumstances neither the contract nor the right of action passed to the trustee. 3 Remington, §§ 1231, 1269, 1266." (p. 592.)

(b) In the Fourth:

In *Florance v. Kresge,* (4 Cir. 1938) 93 F. 2d 784, the Court said:

"And we agree, also, with the court below in holding that no rights which could be asserted against Kresge under the 5 per cent. rental agency contract passed to the receivers or to the trustee in bankruptcy. That contract, which was in writing, provided for personal services involving a relationship of personal confidence and is to be distinguished from the oral contract under which Connelly was promised 20 per cent. of the profit for reletting the property for Kresge at an advanced rental and which had already been performed on his part. It was the usual form of rental agent's agreement, providing for the collection of rental by the agent and the payment of a commission of 5 per cent. on the rent collected. While the rental of the premises was recited as one of the considerations for the creation of the agency, it is clear that the commissions stipulated were for services to be rendered in the collection of rental * * *."

* * * * *

"A different situation exists, however, with respect to the contract under which Connelly was

promised 20 per cent. of the profit to be derived from subleasing the property. The services which he, as agent, was to render under that contract had already been performed at the time of the bankruptcy; and nothing remained to be done on his part. While he, or the partnership which was the beneficiary of the agreement, could deduct the compensation for this service from the rental as collected, it was not compensation for the collection, the latter being covered by the 5 per cent. contract. We see no reason, therefore, why Connelly, or the partnership, would not have been entitled to the 20 per cent. due as compensation for negotiating the sublease, whoever may have collected the rental from the subtenant. It had become a right under the contract not coupled with any personal obligation or confidence and, as such, was assignable and passed to the trustee in bankruptcy under Bankr. Act §70a(5), 11 U.S.C.A. §110(a)(5)." (pp. 786/7.)

(c) In the Sixth:

In *Miller v. Mutual Holding Co.*, (6 Cir. 1939) 101 F. 2d 323, the Court said:

"On January 6, 1934, Miller, relying upon his contract, brought suit in the Court of Common Pleas of Mahoning County, Ohio, against Hamilton for damages for a breach of the contract and for an accounting. The suit resulted in a judgment in Miller's favor for $5,516.30. He had not listed the claim upon which he sued in his schedules filed in bankruptcy.

"On October 25, 1935, the City Trust & Savings Bank, a creditor (predecessor to appellee, The

Mutual Holding Company), filed a petition to reopen the bankruptcy case for the purpose of administering the judgment against Hamilton as an asset of Miller's estate. Miller resisted upon the ground that the contract upon which the judgment was obtained was for personal services requiring the exercise of skill and judgment upon his part and that Hamilton had entered into it by reason of his confidence in Miller's peculiar ability to supervise and manage the mining operations, and that therefore his, Miller's, interest in it was not transferable to his trustee. The Master reported that the petition should be denied. The Court overruled the Master and granted it.

"Miller's contention has merit. He was an experienced miner. He had, for over fifteen years, built up some knowledge of, and aptitude for, coal stripping operations. It was his acumen that led to the discovery of the particular mine involved. He offered to operate it if Hamilton would finance it. We do not think that Miller's rights, under such a contract, passed to his trustee. They depended upon the personal performance of his obligations. The trustee very probably would have been wholly unfit to operate the mine and Hamilton would not have been required to accept his services." (p. 324.)

3. The Holding of the Circuits is Consonant With the Recognized Authority on Bankruptcy Law.

Collier's 4th Edition, Volume 4, succinctly sets forth the proposition:

"Where an uncompleted contract between the bankrupt and another is of such a nature as to

be based on personal service, or skill, or personal trust and confidence, the bankrupt's trustee does not take title to the bankrupt's rights in such contract. Accordingly, it has been held that the bankrupt may bring an action for a subsequent breach thereof. On the other hand, where the contract has been completed before bankruptcy to the extent that nothing remains to be done but the payment of money, the claim becomes a chose in action that passes to the trustee and is assignable by him." (pp. 1166/8.)

(See also: *Remington Vol. 3, page 590.)*

III.

THERE IS NO ISSUE THAT THE CIRCUIT ASSUMED FACTS.

The Trustee, however, suggests that the Fifth Circuit assumed an unstipulated fact—that the funds paid by the bankrupt to the respondent came from the avails of the bankrupt's non-assignable contract. For instance:

> "The stipulation does not contain any statement that shows that the defendant-appellant was paid the $10,456.59 out of the $48,825.00 received by the bankrupt from the County on the contract in question." (p. 9 of Petition for Writ.)

* * * * *

> "The plaintiff-appellee has already pointed out in the Statement of the Case that all relevant facts

in connection with litigation were stipulated to by the parties. In spite of this, the Court of Appeals in its decision assumed the fact that the defendant was paid out of the $48,825.00 received by the bankrupt from the contract with the County. This fact was not stipulated to by the parties and does not form part of the record." (p. 16 of Petition for Writ.)

The Trustee's suggestion is without basis. The stipulation of fact states that on July 11, 1958, the bankrupt received a check for $48,825 from the political subdivision and contemporaneously issued its check to respondent for $10,456.59.

With even greater particularity the Trustee, in his Petition for Writ, traces the fund:

> "On July 10, 1958, the bond issue was ready to be sold, and the actual sale of the bonds took place on July 11, 1958, at which time the County delivered to Gulf, the bankrupt, its check for $48,825.00. This check was deposited in the regular checking account of the bankrupt corporation maintained in the Union Planters Bank, Memphis, Tennessee." (p. 8 of Petition for Writ.)
>
> * * * * *
>
> "On July 11, 1958, Gulf, the bankrupt, issued a check to the defendant-appellant, Ford, Bacon & Davis, Inc., in the amount of $10,456.59. This check was drawn on the regular checking account maintained by the bankrupt in the Union Planters Bank, Memphis, Tennessee, and the check was paid by the bank on July 15, 1958, some five days after Gulf had been adjudicated a bankrupt." (p. 5 of Petition for Writ.)

Respondent submits that it is quite explicit that the bankrupt received money under the non-assignable contract, deposited that money in Memphis and at the same time drew on that Memphis account to pay respondent. The tracing of the fund is complete and clear.

IV.

CONCLUSION.

This case involves an important portion of Federal law, but a portion which has been well settled by four Circuits in consonance with the recognized authorities, and Respondent therefore submits that the writ should not be granted.

HARRY McCALL,
and
GIBBONS BURKE,
Attorneys for Respondent,
1500 National Bank of
Commerce Bldg.,
New Orleans 12, La.,

By HARRY McCALL.

CERTIFICATE.

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared GIBBONS BURKE, who, after being duly sworn, did depose and say:

That he is one of the attorneys for the respondent in the foregoing brief and that he has caused to be served a copy of the foregoing brief on Paul J. Thriffiley, Jr., Esquire, Attorney for appellee, by placing a copy of same addressed to his office, in the United States Mails, postage prepaid.

/s/ GIBBONS BURKE.

Sworn to and subscribed before me, this 10th day of April, 1963.

(Sgd.) PAUL A. WALTY

Notary Public.

(Seal)